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NO. 79-1734

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT PARRATT, ET AL.,
Petitioner

v.

BERT TAYLOR, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE

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I.

QUESTION PRESENTED

1. Whether the simple negligence of a prison official in losing a package constitutes a deprivation of property without due process sufficient to form the basis of a judgment under 42 U.S.C. §1983.

PARTIES

The parties to this case are Robert Parratt and Francis Lugenbill, the petitioners, and Bert Taylor Jr., the respondent.

INTEREST OF AMICUS CURIAE

The Commonwealth of Massachusetts files this brief in support of the petitioner's claim.

TABLE OF CONTENTS

QUESTION PRESENTED.....I

PARTIES.....I

INTEREST OF AMICUS CURIAE.....I

OPINION BELOW.....2

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.....2

STATEMENT OF THE CASE.....3

SUMMARY OF ARGUMENT.....3

ARGUMENT.....4

I. THE ACTION OF THE PRISON OFFICIALS DID NOT VIOLATE THE RESPONDENT'S CONSTITUTIONAL RIGHTS.....4

A. THERE IS NO CONSTITUTIONAL DUTY TO PROPERLY DELIVER PACKAGES WHICH ARE SENT TO PRISONERS.....5

B. THE NEGLIGENT LOSS OF A HOBBY KIT WORTH $23.50 IS A DE MINIMUS CONSTITUTIONAL VIOLATION.....7

II. THE PRISON OFFICIALS DID NOT ACT WITH THE REQUISITE LEVEL OF INTENT REQUIRED FOR A SECTION 1983 ACTION BASED ON A FOURTEENTH AMENDMENT VIOLATION.....9

A. THE DISTRICT COURT JUDGE MISAPPLIED PRECEDENT.....9

B. EITHER INTENTIONAL OR GROSSLY NEGLIGENT CONDUCT IS NECESSARY FOR AN UNCONSTITUTIONAL DEPRIVATION OF LIBERTY OR PROPERTY.....11

III. ALLOWING ACTIONS BASED ON SIMPLE NEGLIGENCE VIOLATES THE PURPOSE OF 42 U.S.C. §1983.....17

CONCLUSION.....19

APPENDIX A.....A-1

APPENDIX B.....A-7

IV.

TABLE OF AUTHORITIES

Baker v. McCollan
_____ U.S. _____,
99 S. Ct. 2689 (1979).....5,6,7,10

Bonner v. Coughlin
545 F.2d 565
(7th Cir. 1976) (en banc)
cert. denied 435 U.S. 932
(1978).....14,15,17

Carey v. Piphus
435 U.S. 247 (1978).....10

Estelle v. Gamble
429 U.S. 97 (1978).....7,10

Ferranti v. Moran
618 F.2d 888 (1st Cir. 1980)....15

Griffen v. Breckridge
403 U.S. 88 (1971).....12

Howell v. Cataldi
464 F. 2d 272 (3d Cir. 1972)..9,10

Jenson v. Klecker
599 F.2d 243 (8th Cir. 1979)....15

Monroe v. Pape
365 U.S. 167 (1961)..9,10,16,17,18

Nickens v. White
536 F. 2d 802 (8th Cir. 1976)....7

Owen v. City of Independence
445 U.S. 622 (1980).....18

Paul v. Davis
424 U.S. 693 (1976).....10,11

Pitts v. Griffin
518 F. 2d 72 (8th Cir. 1975).....8

Procunier v. Navarette
434 U.S. 555 (1978).....16

Robertson v. Wegmann
436 U.S. 584 (1978).....18

Russell v. Bodner
489 F. 2d 280 (3d Cir. 1973).....8

Stringer v. Rowe
616 F. 2d 993 (7th Cir. 1980)...15

Constitutional Provision:

Fourteenth Amendment.....Throughout

Statute:

42 U.S.C. §1983 (1976)...Throughout

Miscellaneous:

Developments in the Law:
Section 1983 and Federalism,
90 Harv. L. Rev. 1133, 1205-1209
(1977).....16

McCormack, Federalism and Section
1983: Limitations on Judicial
Enforcement of Constitutional
Protections, Part I,
60 Va. L. Rev. 1, 54-55 (1974).....16

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BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE

The Commonwealth of Massachusetts respectfully asks that the decision of the United States Court of Appeals for the Eighth Circuit be reversed.

OPINION BELOW

The memorandum opinion of the United States District Court for the District of Nebraska, Civ. 76-C-57 (10/25/78) is set out in Appendix A. The United States Court of Appeals for the Eighth Circuit summarily affirmed the decision of the District Court without issuing an opinion.

JURISDICTION

This Court has jurisdiction over this case under 28 U.S.C. 1291.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law...."

42 U.S.C. §1983, the statutory basis for respondent's suit, is set out in Appendix B.

STATEMENT OF THE CASE

The Commonwealth accepts the statement of the case set out in petitioners' brief.

SUMMARY OF ARGUMENT

1. The action of the prison officials in allowing their subordinates to negligently lose a package sent to the plaintiff/appellee did not violate his constitutional rights. First, there is no constitutional right to receive a package sent through the mail, nor a constitutional duty to properly deliver packages. Second, the loss of a hobby kit worth $23.50 is de minimus.

2. The District Court misapplied precedent. Either intentional or grossly negligent conduct is necessary to deprive someone of liberty or property without due process.

3. The purpose of 42 U.S.C. §1983 is not achieved by allowing actions based on merely negligent conduct. The deterrent effect of allowing negligent conduct to trigger a constitutional violation is far outweighed by the increased liability of state officials and increased federal caseload.

ARGUMENT

I. THE ACTION OF THE PRISON OFFICIALS DID NOT VIOLATE THE PLAINTIFF'S CONSTITUTIONAL RIGHTS

The first element of a Section 1983 suit is the deprivation of a right "secured by the Constitution and laws."

Baker v. McCollan, _____ U.S. _____, 99 S. Ct. 2689, 2692 (1979). It is possible to dispose of this case by finding either that there is no constitutional right to have packages properly delivered to prisoners, or that the loss of a hobby kit worth $23.50 is a de minimus constitutional deprivation of property. However, due to the significance of the issue, it would be preferable for this Court to clearly articulate the intent necessary for the deprivation of liberty or property without due process under a Section 1983 action.

A. THERE IS NO CONSTITUTIONAL DUTY TO PROPERLY DELIVER PACKAGES WHICH ARE SENT TO PRISONERS

The respondent's basic claim is that the prison officials failed to properly

deliver a package, which he had ordered through the mail. In order for this failure to constitute the basis of a Section 1983 action, there must be a constitutional duty to properly deliver packages or conversely a constitutional right to receive packages sent through the mail. In Baker v. McCollan, supra, at 2695, this Court determined that a detention of three days based on a facially valid arrest warrant did not rise to the level of a constitutional deprivation of liberty without due process. Similarly, in this case the failure of the prison guards to properly deliver the package does not rise to the level of a constitutional deprivation of property without due process. The respondent may well have a state tort

action for conversion, misdelivery by a bailee, or negligence but neither conversion nor misdelivery nor negligence become constitutional violations because the plaintiff is a prisoner or the defendant a state official. Cf. Baker, supra, at 2696 (false imprisonment); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (medical malpractice).

B. THE LOSS OF A HOBBY KIT WORTH $23.50 IS A DE MINIMUS CONSTITUTIONAL VIOLATION

The district court found that the loss of respondent's hobby kit was a deprivation of property without due process in violation of the Fourteenth Amendment to the Constitution. (Appendix A at 9). The hobby kit was worth $23.50. In Nickens v. White, 536 F.2d

802, 803 (8th Cir. 1976) the court determined that the confiscation of an office supply catalogue from a prisoner was a de minimus deprivation of property. In Pitts v. Griffin, 518 F.2d 72, 73 (8th Cir. 1975) the prisoner's claim of a deprivation of property based on the confiscation of a multi-frenquency radio was dismissed as frivolous.[1/] Similarly, if this Court should find this loss of a hobby kit worth $23.50 to be a constitutional violation, it should also find it to be de minimus.

1/ But see, Russell v. Bodner, 489 F.2d 280, 281 (3d Cir. 1973) (deprivation of seven packages of cigarettes sufficient for constitutional violation).

II. THE PRISON OFFICIALS DID NOT ACT WITH THE REQUISITE LEVEL OF INTENT REQUIRED FOR A SECTION 1983 ACTION BASED ON A FOURTEENTH AMENDMENT VIOLATION

A. THE DISTRICT COURT JUDGE MISSAPPLIED THE LAW

The district court judge, citing Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972) and Monroe v. Pape, 365 U.S. 167 (1961), determined first that a Section 1983 action proceeds against a background of tort liability. (App. A at 6). Second, the judge determined that negligence is a tort. From the two premises, the district court concluded that a negligent act may form the basis of a Section 1983 suit. (App. A. at 6).

Neither Howell v. Cataldi, supra, nor Monroe v. Pape, supra, support the court's analysis. In Howell, supra the Third Circuit specifically stated that "proof that the conduct was

intentional," is required for an action under Section 1983. Howell, supra, at 281. The "background of tort liability" referred to in Monroe, supra at 187, involved intentional torts.[2/]

The district court judge's analysis also involves an incorrect logical leap from premise to conclusion. Not all tort violations are Section 1983 violations. Paul v. Davis, 424 U.S. 693 (1976) (defamation) Baker v. McCollan, ____ U.S. ____, 99 S. Ct. 2689, 2693-94 (false imprisonment). Estelle v. Gamble, 429 U.S. 97 (1978)

2/ If tort law is applied to the facts in Monroe, supra, the defendants probably committed the intentional torts of assault, battery, false imprisonment, intentional infliction of emotional distress and invasion of privacy. See Restatement Torts 2d, §8A, set out at note 6, infra., for the classic statement of tort intent.

(medical malpractice). Simply finding a possible basis for tort liability does not establish an action under Section 1983. Care must be taken in employing the tort analogy. Carey v. Piphus, 435 U.S. 247, 254-56 (1978).

B. EITHER INTENTIONAL OR GROSSLY NEGLIGENT CONDUCT IS NECESSARY FOR AN UNCONSTITUTIONAL DEPRIVATION OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS

In Paul v. Davis, 424 U.S. 693, 699 (1961) this court stated that the due process clause of the Fourteenth Amendment and Section 1983 do not "make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state law tort claims." In this case, the plaintiff, Taylor, did not claim that the prison officials took his hobby kit, but that their negligence

permitted some unknown person to take the kit.[3/] The Fourteenth Amendment does not extend to such a claim; it does not grant a prisoner a right to be free from injury wherever the state may be characterized as the tortfeasor. Paul, supra at 700. The Fourteenth Amendment is not

> a font of tort law to be superimposed upon whatever systems may already be administered by the states. We have noted the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, Griffin v. Breckridge, 403 U.S. 88, 101-02 (1971); a fortiori the procedural guarantees of the Due

3/ The issue of whether the defendants in this action, the warden of the prison and the supervisor of the hobby shop, should properly be liable under a theory of respondeat superior is not addressed in this Amicus brief.

> Process Clause cannot be the source for such law.

Paul, supra, 424 U.S. at 700. The dissenting justices in Paul, supra argued that "intentional conduct" which deprives a person of liberty or property without due process is within reach of Section 1983. Paul, supra, 720. But this Court has never indicated that merely negligent conduct triggers a constitutional violation.

In order to deprive someone of property without due process, or to act under color of state law and cause a deprivation of property without due process, intentional or reckless or conduct is required. There was simply no intentional or reckless action involved in the loss of Taylor's property.

Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976) (en banc) cert. denied 435 U.S. 932 (1978), a case involving a Section 1983 suit based on a negligence claim, followed this analysis of a Fourteenth Amendment violation. In Bonner, supra, prison guards negligently left a prisoner's cell door open while he was away from his cell. When he returned, his cell had been ransacked and his trial transcript taken. The Seventh Circuit affirmed summary judgment for the defendants on the negligence claim. Bonner, supra 545 F.2d at 569. The Court in Bonner clearly stated that

> [t]here is no claim that the guards intended the result or

> even acted in reckless disregard of Bonner's constitutional rights. Given that lack of intent and lack of reckless disregard, we hold that in the context of Section 1983 the guards did not deprive him of his property and, therefore did not cause him to be subjected to the deprivation of his Fourteenth Amendment right not to have his property taken by the state without due process.

Bonner, 545 F.2d at 569. Similarly, in Stringer v. Rowe, 616 F.2d 993, 100 (7th Cir. 1980) the Seventh Circuit held that the negligent loss of a prisoner's personal papers while being transferred from one prison to another did not create a constitutional violation.[4/]

[4/] Cf. Ferranti v. Moran, 618 F.2d 888 (1st Cir. 1980) (allegation that guard "unlawfully and viciously" took a prisoner's radio and "knowingly destroy[ed]" it for no legit[imate] reason" survives a motion to dismiss; Jenson v. Klecker, 599 F.2d 243, 245 (8th Cir. 1979) (allegation of intentional deprivation of property sufficient for complaint).

Chief Justice Burger, concurring in Procunier v. Navarette, 434 U.S. 555, 568 (1978), has sweepingly indicated that "[n]either the language nor the legislative history of §1983 indicates that Congress intended to provide remedies for negligent acts." At least with regard to the Fourteenth Amendment, negligent conduct is insufficient to create a deprivation of liberty or property.

In Monroe v. Pape, 365 U.S. 167, 187 (1961) this Court indicated that specific intent is not required in a civil rights case.[5/] The more

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5/ See, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1205-1209 (1977); McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I, 60 Va. L. Rev. 1, 54-55 (1974).

general tort intent - intending the consequences of ones actions - is required.[6/] Certainly Monroe, supra, does not indicate that negligence is sufficient to trigger a constitutional deprivation of property without due process. Bonner v. Coughlin, supra. 545 F.2d at 568.

III. ALLOWING ACTIONS BASED ON SIMPLE NEGLIGENCE VIOLATES THE PURPOSE OF 42 U.S.C. §1983

The central purpose of the Civil Rights Act was "to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the

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6/ Restatement Torts 2d, S8A provides: The Word 'intent' is used through the Restatement of this subject to denote that the actor desires to cause consequences of his act, or that he belives that the consequences are substantially certain to result from it.

wrongdoer is clothed with the authority of state law'" Owen v. City of Independence, 445 U.S. 622, 650 (1980) quoting Monroe v. Pape, 365 U.S. at 184. Not only was Section 1983 designed to provide redress to victims of constitutional violations but more importantly it was "to serve as a deterrent against future constitutional deprivations." Owen, supra., at 651, Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978).

A Section 1983 suit directed at a state official who is intentionally depriving a person of liberty or property without due process will undoubtably have a deterrent effect on future abuses of power. On the other hand, a Section 1983 suit is less likely to deter future mistakes, or negligent

conduct. Allowing Section 1983 suits to be based on simply negligent deprivations of liberty or property without due process would vastly increase the liability of state officials and inundate the federal courts with negligence suits, while only marginally serving the purpose of Section 1983.

CONCLUSION

For the reasons stated above the decision of the United States Court of Appeals for the Eighth Circuit, which summarily affirmed the decision of the United States District Court for the District of Nebraska, should be reversed.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

ROBERT PARRATT, et al.,

Defendants.

MEMORANDUM OPINION

(Filed October 25, 1978)

This civil rights action pursuant to 42 U. S. C. § 1983 is before the Court on a motion for summary judgment by the plaintiff, Bert Taylor. The plaintiff claims that he has been denied certain property, that is, a hobby kit valued at $23.57, without due process of law. This Court has jurisdiction under 28 U. S. C. § 1343. The parties entered into a stipulation of facts which are these:

Mr. Taylor ordered a kit through the mail and paid for the order with two drafts drawn on his inmate account by the prison officials. The packages arrived at the penal complex on April 15, 1975, and were signed for by inmates assigned to the hobby center. Mr. Taylor was in the adjustment center at the time and not permitted to have such hobby materials. Normal prison policy for the receipt of mail packages is that after packages arrive in the central mail room, they are either delivered to the prisoner who signs a receipt for the package or the prisoner is notified to pick up the package

and sign a receipt for the package at that time. It is not a policy to allow other inmates to sign for packages because the receipt is the prison's record of having delivered the package to the prisoner. Deviations from these regulations occur under exceptional circumstances, but no such circumstances existed here. Mr. Taylor contacted several officials in regard to the whereabouts of his packages but no one was able to find them. Mr. Taylor has never received the packages.

Three issues are presented by the motion for summary judgment: whether negligent action by state officials can be a basis for an action under 42 U. S. C. § 1983; whether penal complex officials are immune from damage actions of this kind; and whether a property right of this sort is cognizable under Section 1983.

The first issue that must be addressed is whether the negligence of state officials can be a basis for an action for deprivation of property under Section 1983. Section 42, United States Code, Section 1983, provides in pertinent part:

> Every person who, under color of any statute, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Howell v. Cataldi*, 464 F. 2d 272 (3d Cir. 1972), the court analyzed a damage action under Section 1983 in the following manner: the petition must show that the conduct was done by someone under color of law and

that the conduct subjected the complainant to a deprivation of rights secured by the Constitution. Once deprivation has been established, the proof proceeds against a backgromnd of tort liability. The court stated:

> Thus, although proof of specific intent to deprive a person of his federally protected rights is not required, there must be at least proof of the "condition usually demanded by the law for liability in an action of tort (which) is the existence of either wrongful intention or culpable negligence on the part of the defendant." Salmond, *Law of Torts*, 6th Ed. 1924 p. 11.

This "background of tort liability" was originally discussed in *Monroe v. Pape*, 365 U.S. 167 (1961):

> The word "wilfully" does not appear in Section 1979 (Section 1983). . . . Section 1979 (1983) should be read against the backgrounnd of tort liability that makes a man responsible for the natural consequences of his actions.

Therefore, under *Monroe* and *Howell, supra*, negligence can form the foundation for an action under Section 1983. Most actions under this section have involved personal injuries; however, the Eighth Circuit has specifically recognized actions involving a deprivation of property as cognizable under Section 1983. *See Nickens v. White*, 536 F. 2d 802 (8th Cir. 1976).

The second issue is whether the prison officials are immune from a damage action such as this. In *Procunier v. Navarette*, 46 U.S.L.W. 4144 (February 22, 1978), it was alleged that prison officials had negligently and inadvertently misapplied prison regulations which denied prisoners their constitutional rights. The prison officials defended on the basis that the officials were immune

from damage actions under Section 1983. The Court's decision supplied only qualified immunity and stated the standard as follows:

> The immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct.

The officials in *Procunier* were granted immunity because at the time the cause of action arose, there was no clearly established first amendment right protecting the mailing privileges of state prisoners. In dicta, *Procunier* established that total immunity is not available for prison officials, but the question of whether negligent conduct by prison officials could form the basis for a cause of action under Section 1983 was never reached. This court must consider other case law for direction on that question.

In *Wood v. Strickland*, 420 U.S. 308 (1975), a suit was brought against members of a Board of Education by two students who were suspended for several months for allegedly "spiking" punch with two bottles of malt liquor at a school function. The school board members raised the defense of absolute immunity from damage actions. The district court found the school board members immune; however, the circuit court reversed and reached the merits of the decision. On review by the Supreme Court, the following standards for immunity were set forth:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the ac-

> tion he took within his sphere of official responsibility would violate the constitutional rights of the students affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." (Citation omitted.) A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot be characterized as being in good faith.

The plaintiff argues that under the *Woods* analysis, the prison officials knew or reasonably should have known that their failure to follow normal procedures would result in a violation of Mr. Taylor's constitutional rights and are, therefore, not immune from suit under Section 1983. This court finds that the *Woods* analysis is applicable to actions against prison officials and that no immunity from suit exists in this situation where the defendants knew or reasonably should have known that their actions would result in a violation of Mr. Taylor's rights.

The final issue is whether the specific deprivation of property, a hobby kit, implicates due process rights. In *Nickens, supra,* the Court found that the confiscation of a mail order catalog was so deminimus that due process rights were not infringed. *See also Pitts v. Griffin,* 518 F. 2d 72 (8th Cir. 1975), involving the confiscation of a multi-frequency radio pursuant to prison regulations limiting radios to AM frequencies; *Rhodes v. Sigler,* 448 F. 2d 1237 (8th Cir. 1971), concerning a prison bill for $2.45; *Howard v. Swenson,* 426 F. 2d 277 (8th Cir. 1970), in-

volving the confiscation of several pairs of shoes. However, in the instant case, Mr. Taylor received authorization to procure the hobby kit and requested that prison personnel withdraw payment for the kit from his prison account. The hobby kit was ordered and paid for, sent to Mr. Taylor through the United States mails, and received by the prison but never delivered to Mr. Taylor. This is not a situation where prison officials confiscated contraband. The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in a loss of personal property for Mr. Taylor, which loss should not go without redress.

Accordingly, this Court finds that the plaintiff is entitled to prevail on the motion for summary judgment and to an award for damages and attorney fees under 42 U. S. C. § 1988. However, an order according to this memorandum will not be entered until such time as the parties are heard with reference to attorney fees. To that end, if the parties are unable to agree and stipulate to a fee, without prejudice to their respective rights to appeal, within ten (10) days from date hereof, they shall so notify this Court so that a hearing date may be scheduled and the matter presented to the Court for determination.

BY THE COURT:

/s/ Albert G. Schatz

Judge, United States District Court

Appendix B.

42 U.S.C. §1983 Provides:

Every person who, under color or any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.